

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of SYLVESTER NOCERINI,
Deceased.

WILSON, SCHWABA & SPANGENBERG, S.C.
and PHILO, ATKINSON, STEPHENS, WRIGHT,
WHITAKER & PHILO,

UNPUBLISHED
May 29, 2003

Petitioners-Appellees,

v

MARILYNN J. PETERSON, Personal
Representative of the Estate of SYLVESTER
NOCERINI, Deceased,

No. 242557
Iron Probate Court
LC No. 98-000093-IE

Respondent-Appellant.

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Respondent appeals as of right the probate court's grant of attorney liens against a wrongful death recovery. This case arose when two law firms claimed an interest in a wrongful death settlement that they helped recover. We affirm.

Respondent argues that the probate court erred when it heard the firms' claims in the context of a distribution hearing. We disagree. We review de novo a trial court's resolution of issues of law including the interpretation of statutes and court rules. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). In this case, respondent recovered \$125,000 in a wrongful death action after she had discharged petitioners. Respondent then moved to distribute the judgment under MCL 600.2922. Petitioners claimed rights in the recovered funds because they had worked extensively on the case and had incurred costs to advance it.

When a personal representative files a wrongful death action, the procedure in MCL 600.2922 for recovering claims applies. MCL 600.2922(9); *Burgess v Clark*, 215 Mich App 542, 546; 547 NW2d 59 (1996). In *Burgess*, we held that a funeral home could submit its claim for services in the same manner as damages claimants under MCL 600.2922(7). *Burgess, supra* at 543-544, 546. Therefore, a claimant may generally recover expenses by filing the claim after

the personal representative sends notice of the distribution hearing and before the hearing's date. *Id.* at 546.

However, the wrongful death act, MCL 600.2922(6)(d), states:

After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons . . . who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering

Therefore, an attorney is arguably precluded from receiving any compensation from a wrongful death settlement or judgment. When interpreting a statute, however, every word should be afforded meaning. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). Furthermore, a statute's words should be read in context to determine the Legislature's intent. *Tyler v Livonia Schools*, 459 Mich 382, 390-391; 590 NW2d 1 (1999). The wrongful death act explains that "the court or jury may award damages as the court or jury shall consider fair and equitable." MCL 600.2922(6). However, the next sentence begins, "The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows" *Id.* Then the statute outlines the distribution procedure. *Id.* Therefore, the statute distinguishes between "damages" awarded by the judge or jury in a wrongful death case and "the proceeds of a settlement or judgment." We hold that the "proceeds" represent the net award after the payment of attorney fees and costs of litigation. *Id.* This interpretation is consistent with the general mandate in MCR 5.313(A) that a personal representative's attorney receive reasonable attorney fees and the rules in MCR 8.121 regarding the calculation of an attorney's contingency fee in a wrongful death action. Therefore, the probate court did not err when it granted petitioners' liens before distributing the funds to the statutory claimant.

Respondent also argues that the attorneys' misconduct precluded the probate court's grant of attorney liens. We disagree. We review a trial court's order granting an attorney lien for an abuse of discretion. *Reynolds v Polen*, 222 Mich App 20, 24; 564 NW2d 467 (1997). In *Reynolds*, we concluded that "as long as a discharged attorney does not engage in disciplinable misconduct prejudicial to the client's case or conduct contrary to public policy," an attorney could recover under quantum meruit. *Id.* at 27. Respondent does not point to any egregious behavior that would lead to lien forfeiture in this case. Likewise, petitioner Wilson, Schwaba & Spangenberg's contingency fee agreement did not preclude its recovery under quantum meruit. *Id.* at 29. Therefore, the probate court did not abuse its discretion when it awarded the liens in this case.

Finally, respondent argues that the probate court violated her right to due process. We disagree. Respondent failed to argue this issue below; therefore, it is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We will not reverse a trial court's decision based on an unpreserved constitutional issue unless the trial court

committed plain error that affected substantial rights. *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

Michigan's due process clause provides in pertinent part: "No person . . . shall be . . . deprived of life, liberty, or property without due process of law" Const 1963, art 1 § 17. Basically, due process in the civil context merely requires adequate notice, a meaningful opportunity to hear and respond to the evidence, and an unbiased judge and factfinder. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000), citing *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). Here, the probate court, on respondent's petition, held a hearing that spanned two days. Respondent was afforded an opportunity to present evidence and respond to all evidence presented by others. The probate court's decisions regarding evidentiary issues were objective and legally sound. Therefore, the court did not violate respondent's right to due process.

Affirmed.

/s/ Michael R. Smolenski

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell